United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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74-1766

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 74-1766

BETTY MARKOWITZ, WALTER MARKOWITZ and CHARLES MARKOWITZ, on behalf of themselves and their sister ESTELLE POSNER,

Plaintiffs-Appellants,

-against-

ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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Statement

This is an appeal from an order and judgment of the United States District Court for the Southern District of New York (Wyatt, J.) dated June 10, 1974, denying a motion for a preliminary injunction directing the Commissioner of Social Services of New York to provide appellant "with medical assistance

payments as provided by law" and dismissing the action for lack of jurisdiction of the subject matter and for failure of the complaint to state a claim upon which relief can be granted.

Questions Presented

1. Are factual allegations concerning matters of state law sufficient for invoking the federal question jurisdiction of a District Court under 28 U.S.C. § 1331?

2. May a District Court's jurisdiction be invoked under 28 U.S.C. § 1343(3) in the absence of any substantial constitutional claim?

Prior Proceedings

The complaint and the exhibits attached thereto set forth the following material allegations of fact: Appellant Estelle Posner is fifty-six years old and is mentally and physically unable to conduct matters in her own behalf. In August of 1971, her husband placed her in a home in Utica, New York. On March 7, 1973, her brothers made, on her behalf, an application for medical assistance to the Oneida County Department of Social Services. On April 18, 1973, the County denied the application on the ground that she was living in a home which was providing for her physical and medical needs. Thereafter, her brothers made a request in her name for a hearing.

In a Decision After Fair Hearing dated December 17, 1973, the State Commissioner declined to recognize that the brothers had any right under the State's regulations to appeal the County's determination. The Commissioner noted that under Section 101 of the Social Services Law, Posner's only legally responsible relative was her husband who refused to be a party to the proceeding, and that the brothers are not legally responsible for her care. Accordingly, he refused to rule on the merits of the appeal. However, if the appeal were properly before him, he would have apparently affirmed the determination.*

Plaintiff invoked the jurisdiction of the District Court under 28 U.S.C. §§ 1331, 1343 and 1337 and requested a declaratory judgment, injunctive relief and damages. However, the factual allegations in the complaint did not support the invocation of these sections. As the District Judge observed, he was presented with a state administrative controversy over medical assistance and not with a matter for the federal courts.

* The Commissioner noted that Posner's needs were being taken care of at the home; and also that since she was a resident of New York City when she entered the home in Oneida County, the City rather than the County, would be responsible for providing her with medical assistance if she became eligible for it. However, contrary to appellant's contentions (App. Br., 7,15,20) these observations did not constitute a determination on the merits of the eligibility issue.

The Judge noted that the State has denied no federally protected rights; that the jurisdictional amount was not present; that no substantial constitutional claim was advanced; that 28 U.S.C. § 1337 does not apply in the absence of anything relating to commerce and anti-trust regulations; and that neither the brothers nor the mother were a proper party to the action.

POINT I

THE FACTUAL ALLEGATIONS CONTAINED IN THE COMPLAINT RAISED THE ISSUE AS TO WHETHER APPELLANT WAS ELIGIBLE FOR MEDICAL ASSISTANCE OR WHETHER THE STATE COMMISSIONER ERRED IN REFUSING TO RULE ON THE CONTENTION, AND SINCE THESE ARE MATTERS OF STATE LAW, AND DO NOT PRESENT A FEDERAL QUESTION, THE DISTRICT COURT LACKED JURISDICTION UNDER 28 U.S.C. § 1331.

Appellant contends that the District Court had jurisdiction of the case under 28 U.S.C. § 1331. There is no merit in the contention. She asked the District court for an injunction directing the State Commissioner to provide her with medical assistance after the Commissioner declined to rule on whether she was eligible for it. Whether the Commissioner was in error is a matter for the State Courts (in an Article 78 proceeding which is apparently pending); whether appellant is eligible for medical assistance is an issue of state law (New York's Social

Service Law § 366) and not a "federal question". See DeMetro v. Ginzberg, 428 F. 2d 743, 746 (2d Cir., 1970); Metcalf v. Swank, 305 F. Supp. 785, 791 (D.C. Ill. 1969); McGaw v. Farrow, 472 F. 2d 952, 955 (4th Cir., 1973); Standard Ventures, Inc. v. State of Arizona, 499 F. 2d 248, 249 (9th Cir., 1974); Jr. C. of Rochester, Inc., N.Y. v. U.S. Jaycees, Tulsa, Okl., 495 F. 2d 883 (10th Cir., 1974). Further the alleged indirect damage from the denial of medical assistance is too speculative to create jurisdiction under Section 1331. Rosado v. Wyman, 414 F. 2d 170, 176 (2d Cir., 1969) reversed on other grounds 397 U.S. 397; McGaw v. Farrow, supra, 954-955 (4th Cir., 1973); Randall v. Goldmark, 366 F. Supp. 947, 950 (D.C. Mass., 1973).

POINT II

APPELLANT FAILED TO ADVANCE ANY SUBSTANTIAL CONSTITUTIONAL CLAIM AGAINST THE STATE COMMISSIONER SUCH AS COULD CONFER JURISDICTION ON THE DISTRICT COURT UNDER 28 U.S.C. § 1343(3).

It is abundantly clear that appellant presents no substantial constitutional claim. "Constitutional insubstantiality" has been equated with the terms "obviously frivolous". Hannis Distributing Co. v. Baltimore, 216 U.S. 285, 288 (1910) and "obviously without merit" Ex Parte Poresky, 290 U.S. 30, 32 (1933).

It has also been subsumed under the doctrine that insubstantiality can be concluded "if...prior decisions inescapably render the claims frivolous." Goosby v. Osser, 409 U.S. 512, 518 (1973); Hagans v. Lavine, 415 U.S. 528, 538 (1974).

Under any of these tests appellant's claims must fail for patent insubstantiality.

Appellant alleges that she was constitutionally deprived of her right to travel and to obtain medical assistance because she traveled to reside in Utica and applied there for medical assistance rather than apply in New York. Clearly no right of "interstate migration" (italics added) has been deterred in this case. Cf Oregon v. Mitchell, 400 U.S. 112, 237, 285 (1970); Shapiro v. Thompson, 394 U.S. 618, 629-631, 634 (1969); Dunn v. Blumstein, 405 U.S. 330, 338 (1972).

As the Court below observed the decision denying medical assistance was grounded on the fact that no application was made in New York City Public Welfare District where she was a resident when she entered the home in Oneida County and that accordingly Oneida County was not obligated under N.Y. Soc. Services Law Section 62(5)(d) to supply assistance. The requirement that local districts bear the responsibility of

its needy has been recently reaffirmed by a statutory three judge court in Lindsay v. Wyman, 372 F. Supp. 1360, 1369-70 (S.D.N.Y., 1974).

Appellant's claim against appellee for damages for alleged wrongful past denial of medical assistance is clearly barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651 (1974). See also Rothstein v. Wyman, 467 F. 2d 226 (2d Cir., 1972), cert denied 411 U.S. 921 (1973).

Appellant presently has pending in the New York Courts a proceeding commenced pursuant to N.Y. Civil Practice Law and Rules Art. 78 where she can properly litigate whether appellee's denial of medical assistance was improper. Clearly since no substantial constitutional claim invoking federal Court jurisdiction is presented she should properly be relegated to pursue her state remedies. Powell v. Workmen's Compensation Board, 327 F. 2d 131 (2d Cir., 1964).

CONCLUSION

THE ORDER AND JUDGMENT SHOULD
IN ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
October 9, 1974

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROSALIN FANN , being duly sworn, deposes and says thats he is employed in the office of the Attorney General of the State of New York, attorney forDefendant-Appellee herein. On the 10th day of October , 1974 , she served the annexed upon the following named person :

JONATHAN A. WEISS
Attorney for Appellants
2095 Broadway, Room 304
New York, New York 10023

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Rosalin Fann
ROSALIN FANN

Sworn to before me this
10th day of October , 1974

Burton Herman
Assistant Attorney General
of the State of New York